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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

COPPERWELD CORPORATION and
REGAL TUBE COMPANY,
Petitioners,

v.

INDEPENDENCE TUBE COMPANY,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE

The National Association of Manufacturers (hereinafter "NAM"), by and through its attorneys, hereby moves this Court pursuant to Rule 36 of the Rules of the Supreme Court for leave to file a brief as *amicus curiae* in support of the Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit. The NAM has received consent from petitioners, but respondent, through its counsel, has refused consent.

The National Association of Manufacturers is a nonprofit voluntary business association incorporated under the laws of the State of New York representing more than 12,500 manufacturing and related business concerns which in the aggregate account for an estimated 85 percent of all manufacturing employees and 80 percent of the nation's industrial output. In addition, through its Associations Department and the National Industrial

Council, NAM is affiliated with approximately 158,000 businesses, many of whom share our vital interest in a clear and effective antitrust enforcement system in the United States.

The NAM is concerned that the intra-enterprise conspiracy doctrine has developed in the lower courts without sufficient guidance from this Court as to its policy justifications and potential ramifications for the various forms of business organizations. As a result, courts have been inconsistent in their approach and business counselors are uncertain about predicting whether virtually any transaction involving members of a corporate family will be subject to the Sherman Act. With the threat of criminal and treble damage liability riding in the balance, clarification and guidance is essential to the proper functioning of the parent-subsidiary relationship between corporations. Because the details of antitrust law, more than most other areas of statutory law, have been developed through judicial interpretation, Supreme Court review of this issue is particularly important. This case presents an ideal factual foundation for a close examination of the intra-enterprise conspiracy doctrine.

We urge that we be granted leave to file our brief as *amicus curiae* to highlight the important effect of this issue on American industry.

Respectfully submitted,

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BRIEF OF THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICUS CURIAE

The National Association of Manufacturers (NAM) hereby submits this brief as *amicus curiae* in support of the petition for certiorari to the United States Court of Appeals for the Seventh Circuit. Our interest is set forth in the accompanying motion for leave to file this brief.

SUMMARY OF THE CASE

The central issue in this case is whether a corporate family can illegally conspire with itself under the antitrust laws. In 1981, a federal court jury found that the Copperweld Corporation and its wholly-owned subsidiary, Regal Tube Company, had conspired to restrain trade in

the steel tubing market in violation of Section 1 of the Sherman Act. Copperweld and Regal supposedly "conspired" by agreeing to a course of action to protect Regal, and consequently the corporate family, from the possibility that a competitor, Independence Tube Corporation, might infringe upon valuable know-how and trade secret rights. The parent, acting within its power to control its subsidiary, sent letters to potential third party suppliers of Independence. These letters warned that Copperweld intended to take all steps necessary to protect the proprietary rights it acquired when it purchased the Regal Tube Company, and the letters were intended to reduce the chance that a court might refuse to enjoin Independence from the unauthorized use of these proprietary rights because of substantial third party reliance interests. One supplier, The Yoder Company, subsequently cancelled its supply contract with Independence, delaying the latter's entry into the tubing business by nine months.

Independence sued, and a jury found sufficient evidence to conclude that Regal Tube Company was a separate entity for purposes of conspiring with its parent, Copperweld, under Section 1 of the Sherman Act. The judge's instructions provided that the jury consider various factors, including the extent to which the two related companies have separate histories, officers and management, corporate offices, salaries and expenses, operating policies, and customers. The Seventh Circuit upheld the jury's conclusion that the companies were separate enough to be coconspirators despite the fact that: (1) Copperweld owns 100 percent of Regal, (2) Copperweld shares corporate headquarters in Pittsburgh with Regal, (3) Copperweld's Chairman and Chief Executive Officer was also Regal's Chairman and Chief Executive Officer, (4) all of Regal's directors and officers were board members and officers of Copperweld,[1] (5) Copperweld owned the know-how and trade secret rights which it sought to protect by sending

[1] Breedlove Tr. 4875-84.

the letters leading to this litigation, and (6) Copperweld exercised effective control over Regal in the very conduct which formed the foundation for an allegation of separateness between them.

SUMMARY OF THE ARGUMENT

For more than 35 years, the courts have been struggling with differing approaches to the intra-enterprise conspiracy question. A number of courts have said that in some instances a corporation and its own subsidiary are not separate legal entities capable of conspiring together under the antitrust laws. The Supreme Court has looked at the issue several times before, and issued rulings that did not fully address the antitrust policy aspects of the issue. As a result, lower courts have developed a large and diverse body of law that produces different results on similar facts, impairs the ability of counsel to advise their corporate clients, and casts a cloud over all forms of subsidiary corporate organizations. Questions arising under the antitrust laws, particularly in this unsettled area, demand resolution by this Court.

ARGUMENT

This Court has had several occasions to consider issues arising from antitrust suits where a conspiracy is alleged between two related corporations or divisions of corporations. Each of the decisions to date has helped guide our understanding of the factors to be considered in determining whether there are, for purposes of antitrust law and policy, more than one "person" acting to restrain competition. However, the lower courts have varied widely in their approaches to this situation in individual cases. The clearest statement of the unity of a corporation for antitrust conspiracy purposes is the principle that two officers of the same corporation can agree on corporate pricing or marketing policies without being liable

for conspiracy.[2] On the other end of the spectrum, two officers from unrelated companies clearly may not reach agreements in these areas without violating section 1 of the Sherman Act. Petitioners' case here involves the area in between these extremes, where officers or agents of two related corporations make agreements that may have significance with respect to competitors in the marketplace.

I. THIS COURT'S PAST DECISIONS RELATING TO INTRA-ENTERPRISE CONSPIRACIES DO NOT DEAL WITH THE FACTUAL SITUATION PRESENTED IN THIS CASE.

The Supreme Court has issued a handful of decisions in the last 35 years wherein it was held that wholly or partially-owned subsidiaries conspired with their parent corporations to restrain trade. Each written opinion has contained only a brief, general statement of the doctrine that corporate family members may be found liable for conspiracies among themselves, but in no instance have the holdings been supported by analysis of any underlying policy. In fact, more detailed explanations have been produced by the Court in cases where it felt compelled to rule that certain intra-enterprise activities were fully protected from liability under the Sherman Act. In addition, those decisions enunciating the broad rule of liability were grounded on fact patterns that indicate some reason for finding antitrust liability other than a conspiracy between a parent corporation and its wholly-owned subsidiary. Moreover, as the facts of the *Copperweld* case indicate that it is sufficiently distinguishable in this area from the facts arising in previous cases decided by this Court, a more complete review of the fundamental principle of intra-enterprise conspiracy and its application to wholly-owned subsidiaries is justified at this time.

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[2] *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953).

The Seventh Circuit's opinion itself recognizes that the Supreme Court's decisions are far afield from academic discussion of the intra-enterprise conspiracy doctrine.[3] It discounts the "sweeping Supreme Court dicta" as not to be read with complete literalism, yet goes on to apply the dicta in a situation which this Court has not heretofore addressed.

For example, most of the cases decided to date involve a significant degree of competition between the related companies. In *United States v. Yellow Cab Co.*,[4] this Court ruled that the more important taxicab companies in Chicago, New York, and other cities may not avoid violating the Sherman Act by merging together where "the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete." The taxicab companies were competitors before merger. The Court's ruling indicates that the act of affiliation itself was deemed part of the conspiratorial act, but says nothing about situations such as the case at bar where the affiliation was made prior to and with no connection to the alleged conspiratorial act. Nevertheless, the statement was adopted in numerous subsequent decisions as the building block for a broader statement of the intra-enterprise conspiracy doctrine.

Thus, in 1948, the Court found that a chain of motion picture theaters had conspired with wholly-owned subsidiaries to monopolize the film distribution network in six states.[5] Relying on *Yellow Cab*, it ruled that the concerted action of the parent and its wholly-owned subsidiaries "was not immunized by reason of the fact that the members were closely affiliated rather than independent."[6]

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[3] 691 F.2d at 317-18.

[4] 332 U.S. 218, 229 (1947).

[5] *Schine Chain Theaters, Inc. v. United States*, 334 U.S. 110 (1948).

[6] *Id.* at 116.

In *United States v. Paramount Pictures, Inc.*,[7] decided the same day, the Court also found a restraint of trade where movie theaters were jointly owned by exhibitors who would otherwise have been in competition with each other. The Court gave no justification for these rulings, but once again the issue arose in the context of companies engaged in monopolization or otherwise in direct competition with each other. In other words, there was evidence of some other antitrust violation that helped persuade the Court to find liability.

In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*,[8] the Supreme Court again gave cursory review to the claim that Section 1 of the Sherman Act does not apply to companies acting as "mere instrumentalities of a single manufacturing-merchandizing unit." Referring only to *Yellow Cab's* statement that common ownership and control of corporations does not liberate them from the antitrust laws, the Court found the rule "especially applicable where . . . respondents hold themselves out as competitors."[9] In *Timken Roller Bearing Co.* v. *United States*,[10] the Court again found no reason to exempt from the Sherman Act agreements between legally separate companies "to suppress competition among themselves and others . . . ," assuming that the three affiliated companies would have competed with each other in the sale of antifriction bearings in the U.S., British, and French markets. The case at bar has no possibility of competition similar to that present in both *Kiefer-Stewart* and *Timken*, since the parent Copperweld does not compete with Regal in the manufacture and sale of steel tubing. Thus the rationale of those cases for holding affiliated corporations liable for conspiring to reduce competition between themselves does not apply.

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[7] 334 U.S. 131 (1948).

[8] 340 U.S. 211, 215 (1951).

[9] *Id.*

[10] 341 U.S. 593, 598 (1951).

This Court again ruled in 1968 that a parent and its subsidiaries could conspire under Section 1 of the Sherman Act as long as they are doing business through separate corporations.[11] The Court added that in any event there was a combination between the plaintiff and one corporate defendant that justified an antitrust suit.[12] Again there was no expressed justification for refusing to view members of a corporate family as a single entity under Section 1, and the Court gave no policy reason to support an interpretation of antitrust law that penalizes any corporation that has *any* control over a subsidiary's operations.

The result of this whole line of cases is that any time a corporation has a subsidiary, whether wholly-owned or partially-owned, it is exposed to treble damage liability (and its managers to criminal liability) for having any contact with the competitive decisions of that subsidiary. Any competitor could charge that the contact was an opportunity to effectuate a conspiracy that might lead to some effect on competition or a competitor, even if the parent is not in competition with its subsidiary. The antitrust laws were never intended to create such a situation, yet this conclusion is inevitable unless this Court refines its analysis and clarifies its previous rulings.

II. THIS COURT'S LIMITATIONS ON THE INTRA-ENTERPRISE DOCTRINE SHOULD BE CLARIFIED.

Despite the Court's recurring reference to *Yellow Cab's* generalization on intra-enterprise conspiracies, it has refined its analysis and recognized major exceptions in two significant areas. For example, in 1962, the ruling in *Sunkist Growers, Inc. v. Winckler and Smith Citrus*

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[11] *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-42 (1968).

[12] *Id.* at 142.

Products Co.[13] allows courts to look beyond the technical legal differences between companies to the practical reality of the relationship between companies charged with conspiracy. The Court found that three separately-organized legal entities were in fact one organization or association for purposes of falling within the agricultural exemption of the antitrust laws.[14] The Court said, "To hold otherwise would be to impose grave legal consequences upon organizational distinctions that are of de minimis meaning and effect . . . ." [15] The antitrust laws were never intended to apply to agreements made by employees of an individual entity, and this implied "exemption" for intra-enterprise agreements is just as important an exemption as the express statutory exemption for agricultural organizations. The Court's language cutting through the legal formality of separate incorporation of related companies should apply equally well in other parent-subsidiary situations, especially where the subsidiary is wholly owned.

More recently, in *United States Steel Corp. v. Fortner Enterprises, Inc.*,[16] the issue was whether it was an illegal tying arrangement for the parent corporation and its subsidiary to condition the availability of home development financing from the subsidiary on the purchase of prefabricated houses from the parent. Although the issue on appeal was not whether the parent and subsidiary could conspire together, the case was brought under Section 1 of the Sherman Act, and the Court indicated that the separateness of the legal entities (parent and subsidiary) was irrelevant. "[T]heir common ownership and control make it appropriate to regard the two as a

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[13] 370 U.S. 19 (1962).

[14] Clayton Act, § 6, 15 U.S.C. § 17 (1976).

[15] 370 U.S. at 29.

[16] 420 U.S. 610 (1977).

single seller . . . ." [17] The Court went on to say that the tying arrangement was not illegal because the defendants did not possess sufficient economic power in the credit market. Thus it was not illegal under the Sherman Act for a parent and its subsidiary to agree between themselves to condition the availability of credit on the sale of houses. The Court has since ruled that credit terms are just as much an element of price for purposes of the Sherman Act as is the price itself,[18] yet the Court found no problem with a parent and its wholly-owned subsidiary working together to jointly sell houses and credit in this instance. An agreement between two corporations relating to prices is normally a *per se* violation of Section 1, but the Court disregarded the separateness of the wholly-owned subsidiary here.

Thus the issue is squarely presented. As indicated in petitioner's brief,[19] the lower courts have been struggling for years with legal theories and methods to minimize the harshness of an across-the-board ban on cooperation between a parent and its subsidiary. This struggle has been necessary to develop more fully the policy justifications underlying the Court's apparent rule that the subsidiary relationship is at times irrelevant in a conspiracy analysis. As a result, the courts have adopted various tests with different formulae to determine whether two separately incorporated but related corporations are sufficiently separate to conspire as different entities under the Sherman Act. These circuits have held that a parent and its wholly-owned subsidiaries are separate entities for purposes of conspiracy as a matter of law.[20] Others have

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[17] *Id.* at 613.

[18] *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 648 (1980) (per curiam).

[19] Petition for Writ of Certiorari at 9 & App. H.

[20] *See Columbia Metal Culvert Co. v. Kaiser Aluminum and Chemical Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), *cert. denied*, 439 U.S. 876 (1978); *H & B Equipment Co. v. International Har-*

indicated that the ability of related but separately incorporated firms to conspire depends on the facts, each circuit using varying factors to make this determination.[21] Even the circuit court judges recognize the need for Supreme Court resolution of this problem.[22] The alternative formulations of the intra-enterprise conspiracy doctrine make counseling industry on the legality of proposed activities a mine field of uncertainty.

Since this Court has never made a complete analysis of the intra-enterprise conspiracy doctrine, the policies that should underlie it, or the implications that it carries, this case presents an ideal vehicle to do so. The facts are appealingly straight-forward, inasmuch as the lower court found a conspiracy between a parent and its subsidiary even though there was no area of competition between the two entities,[23] there was a substantial overlap of management officers and directors, and the subsidiary was wholly-owned. If this Court were to rule only on the applicability of the Sherman Act's conspiracy language to activities involving parent companies and their wholly-owned subsidiaries, this would be a major step forward in the ability of lawyers and their corporate clients to

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vester Co., 577 F.2d 239, 244-45 (5th Cir. 1978); *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc.*, 508 F.2d 547, 557 (1st Cir. 1974), *cert. denied*, 421 U.S. 1004 (1975).

[21] *See, e.g., Independence Tube Corp. v. Copperweld Corp.*, 691 F.2d 310 (7th Cir. 1982), *cert. pending*, No. 82-1260; *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617-18 (9th Cir. 1979), *cert. denied*, 447 U.S. 906 (1980); *Triebwasser & Katz v. AT&T*, 535 F.2d 1356, 1358-59 n.1 (2d Cir. 1976).

[22] *See Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 587 (8th Cir. 1981) (circuits in disagreement on intra-enterprise conspiracy doctrine).

[23] The Ninth Circuit has indicated that these two factors alone, common ownership and discretion and lack of intra-enterprise competition, arguably make such corporations "incapable of conspiracy." *Thomsen v. Western Electric Co.*, 680 F.2d 1263, 1266 (9th Cir.), *cert. denied*, No. 82-627 (Nov. 8, 1982).

understand what the law is and what impact it will have in a given situation. Without such guidance, there will continue to be a tremendous amount of uncertainty, inconsistency among the circuits, and treble damage judgments in situations that neither Congress nor this Court reasonably expect to result in liability.[24]

III. A STRICT RULE OF INTRA-ENTERPRISE LIABILITY THREATENS THE CONTINUED EXISTENCE OF CORPORATE SUBSIDIARIES.

The use of the corporate subsidiary relationship among NAM members is widespread, and the reasons underlying a corporations' decision to operate its business using separately-incorporated subsidiaries are varied. Separate incorporation provides certain tax, financing, and limited liability benefits, can enhance the ability of companies to negotiate and settle mergers and acquisitions, and can improve management accountability and efficiency. In addition, because of the various financial benefits available to them, separately-incorporated subsidiaries may contribute to economic efficiency, thus enhancing competition in the marketplace and furthering the fundamental goal of the antitrust laws. For this reason, holding a wholly-owned subsidiary liable for conspiracy with its parent under the Sherman Act is in direct conflict with antitrust policy, and should be carefully reviewed to ensure that such conflict does not destroy the proper enforcement of the antitrust laws.

The inconsistencies between the circuits on the intra-enterprise conspiracy question are of particular concern because of the treble damage remedies available to suc-

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[24] By its own language, Section 1 of the Sherman Act requires a conspiracy among more than one party, in contradistinction to Section 2, which applies to any "person." To impose liability under Section 1 on what is in reality a single enterprise would eviscerate Congress' purposeful distinction. *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 589 (8th Cir. 1981).

cessful plaintiffs. While we understand that there will always be some degree of uncertainty in determining in advance whether a particular activity will violate the Sherman Act, this case presents as clearly as possible a situation where the parent had a legitimate financial interest as sole owner of its subsidiary in preserving and protecting its assets. The Supreme Court can aid tremendously in business organizational planning by indicating whether wholly-owned subsidiaries and their parents are capable of conspiring with each other. Without such guidance, companies are left to guess whether the consolidation of corporate offices, the overlap of directors and officers, and the control of 100% of the subsidiary's stock will be enough evidence to justify freedom of action without the fear of antitrust litigation. Where an incorrect prediction by corporate management can change the company's liability from zero to three times any damages resulting from the use of ordinary business judgment, the need for some additional guidance becomes apparent.

If parent and subsidiary corporations are potentially liable under the anti-conspiracy provisions of the Sherman Act, it would be impossible for any corporation to do business in a multicorporate form.[25] Any marketing decision in which an officer or director of the parent company participates could give grounds for a competitor of either the parent or the subsidiary to allege a conspiracy in restraint of trade.[26] Indeed, any decision whatsoever, if it has an impact on the competitiveness of the subsidiary, could lead to an antitrust suit.

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[25] Von Kalinowski, 1 ANTITRUST LAWS & TRADE REGULATION § 601[2][c][ii], at 6-32 (1980). *See* Kintner, *An Antitrust Primer*, at 30 (1964) (predicting that "an inflexible approach requiring competition within a single business unit, although composed of legally separate entities, would introduce chaos, not promote competition").

[26] *See William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1055 (9th Cir. 1981), *cert. denied*, 103 S. Ct. 57 (1982).

CONCLUSION

The NAM does not suggest the substantive principles this Court should adopt to determine whether a corporation and its subsidiary, whether wholly-owned or partially-owned, are capable of conspiring in violation of the Sherman Act. Nor do we comment on the remedies that were available in this case under state law. We do, however, feel that the intra-enterprise conspiracy doctrine has not been fully addressed by this Court, and as a result the circuits have not developed a consistent approach. This Court will significantly advance the understanding of antitrust law by those who must comply with them by taking the opportunity presented by this case to reconsider this major issue and to provide further guidance on the policies that should underlie any analysis of an alleged conspiracy involving wholly-owned subsidiaries or other related parties. The wholly-owned relationship in particular presents the best opportunity for the Court to issue a definitive ruling that is easy to apply to the complexities of the business world. We urge this Court to grant a writ of certiorari to the Seventh Circuit in this case.

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